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[p. 63] into account, and in the matter of parity or comparison to the sentence that has been handed down under the guidelines for Mr. Yost.

THE COURT: Well, let me say to both of you, it troubles me that Mr. Yost, unless I do depart for Mr. Fleming, Mr. Yost is ending up with a sentence below what Mr. Fleming is to receive. That troubles me. I – I may need to revise my – at least review the Supreme Court's decision because there are a number of things that they point out or suggest as considerations, and Mr. Beard says that he does not think that Mr. Fleming falls within any of those.

We've been here a long time. Maybe – maybe the best thing for me to do is break for lunch, come back after lunch after I've had a chance to look at that decision. Because It is troubling me, and if I can depart, what I would like to do is give Mr. Fleming a sentence exactly the same as I gave Mr. Yost. I certainly hate to have Mr. Fleming with a sentence more than Mr. Yost had. But to do that, it requires a departure.

Lets – lets break for lunch and we will come back at two o'clock. I don't think I have got anything at two. Do I have anything?

THE CLERK: No, Your Honor.

THE COURT: We will be in recess until two.

MR. BEARD: May it please the court?

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[p. 65] THE COURT: All right. Let me see if there is any further allocution [sic] from the defendant?

THE DEFENDANT: No, sir.

THE COURT: Mr. Beard, anything further from the government?

MR. BEARD: No, Your Honor.

THE COURT: I – I think I had indicated my feelings to you that I was not comfortable sentencing Mr. Fleming to more than I had sentenced Mr. Yost. Of course, Mr. Yost received a 5K1 motion and did not go to trial, so there is certainly a basis for that, but I wanted to do some research and see if under the Supreme Court's *Coon* decision and I think the law that otherwise applies to this circuit where departures are authorized. And I have not found anything really that would specifically allow me to depart. Counsel, do you want to speak to that?

MR. JOHNSON: Nothing more than I have already said, Judge.

THE COURT: Mr. Beard?

MR. BEARD: Your Honor, the *Hoffa* case, which I cited earlier, would suggest that – that a downward departure, because of the fact that Mr. Fleming in all likelihood would be disbarred as a result of a conviction, is not a proper – they call it a prohibited basis within the *Coon* decision. I know – I could not find any other law

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